

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KAY HOLLAND

Claimant

VS.

ROLLING HILLS HEALTH CENTER

Respondent

AND

KHCA

Insurance Carrier

Docket No. 1,029,520

ORDER

Claimant requested review of the April 8, 2009 Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on July 22, 2009.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument respondent's counsel acknowledged that the outstanding bills for x-rays related to Dr. Curtis's care should have been or will be paid as authorized and that there is no issue as to the medical bills in this appeal. The parties also agreed that claimant is entitled to the \$500 in unauthorized medical allowance and to the extent that allowance has yet to be paid in full, it will be paid upon the presentation of appropriate medical documentation.

ISSUES

The ALJ adopted the impairment opinions expressed by Dr. Fevurly and awarded claimant a 5 percent permanent impairment to each of the upper extremities as a result of the April 9, 2006 accident. The ALJ denied any permanency to the neck, cervical spine

or the right knee as a result of the accident as she concluded that claimant had failed to establish that those parts of claimant's body were permanently injured as a result of the April 9, 2006 accident.

Claimant requests review of the ALJ's decision relating to the nature and extent of her impairment. Claimant maintains that Dr. Curtis' ratings are more consistent with her daily problems and asks the Board to modify the Award to reflect a 15 percent permanent impairment to the right upper extremity and a 24 percent permanent impairment to the left upper extremity as well as a 15 percent whole body permanent impairment for her neck complaints and 29 percent permanent impairment to the right knee.¹

Respondent contends the ALJ should be affirmed in every respect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed in part and modified in part.

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this Order except as needed to explain the Board's findings. Suffice it to say, claimant fell forward while working and immediately fractured both of her elbows.

The only issue in this appeal is the nature and extent of claimant's impairment. There appears to be no dispute that claimant sustained permanent impairment to each of her upper extremities. However, claimant maintains she sustained additional impairment to her neck/cervical area and to her right knee as well. Claimant acknowledges that she had undergone a partial right knee replacement procedure in February 2006 from which she had recovered well, but contends her April 2006 accident led to further impairment.

Three physicians spoke to the ultimate issue of impairment. According to Dr. Michael Schmidt, the physician who performed claimant's knee replacement and continued to treat her after that procedure as well as after her April 2006 accident, testified that claimant merely contused her knee in this subsequent accident. He declined to assign any impairment as a result of the April 2006 accident. He explained that claimant did have some subjective complaints during her office visits but he observed full range of motion, and the x-rays demonstrated appropriate positioning of the medial unicorpartmental arthroplasty. Dr. Schmidt ultimately released claimant to full duty.

¹ Each of these ratings purports to be based on the 4th Edition of the *Guides*. American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

Claimant was also seen by Dr. Lynn Curtis, a physician board certified in physical medicine and rehabilitation, over a nearly 2 year period of time beginning in July of 2006. Dr. Curtis became the designated treating physician but was directed to provide treatment solely to the upper extremities.² Dr. Curtis ultimately rated claimant's upper extremities at 24 percent to the left elbow and 15 percent to the right. These ratings encompass a variety of conditions, including epicondylitis, weakness, supination loss and flexion weakness although Dr. Curtis acknowledged, on cross examination, that claimant's strength, sensation and reflexes all showed to be within the normal range.

Although he did not treat these areas, Dr. Curtis also offered his impairment opinions as to both claimant's right and left knees and her back *based upon his original 2006 examination*. According to Dr. Curtis, claimant bears a 15 percent whole person impairment due to her cervical stenosis and paresthesias in both arms. And she bears a 29 percent impairment to her right knee and a 3 percent impairment to the left knee. He also imposed permanent work restrictions that generally allow claimant to work in the medium to heavy work category.

At respondent's request, claimant was evaluated by Dr. Chris Fevurly, a board certified occupational physician. Dr. Fevurly examined claimant on August 13, 2008 and assigned a 5 percent impairment to both upper extremities due to the persistent pain in claimant's elbows. He testified that there was some weakness but no range of motion deficits in claimant's elbows. Thus he felt the 5 percent bilateral rating accurately reflected her permanent impairment. Dr. Fevurly declined to assign any impairment to claimant's right knee complaints because he found the April 9, 2006 accident was an acute temporary exacerbation of her pre-existing knee problems as evidenced by Dr. Schmidt's records. Finally, he declined to assign any permanency for claimant's neck complaints because he found no objective findings relative to the neck, explaining that without objective findings and solely subjective pain complaints, claimant was limited to a Class I rating, which assigns no impairment.

The ALJ weighed all of this evidence and concluded as follows:

Three doctors testified as to the nature and extent of [c]laimant's impairment. Dr. Curtis' opinion of [c]laimant's impairment is the least credible of the three. Dr. Curtis found that [c]laimant had a twenty-nine percent impairment to the right lower extremity and a three percent impairment to the left lower extremity based on a 2006 examination. Further, he found that the [c]laimant had a fifteen percent whole person impairment to the cervical spine, a twenty-four percent impairment to the left upper extremity and a fifteen percent to the right upper extremity. However, he found that the [c]laimant could do medium to heavy work which involves lifting fifty

² At a preliminary hearing, the ALJ concluded that claimant's neck and knee complaints were not causally related to her April 2006 accident. Thus, her treatment was limited to her bilateral elbow complaints.

to seventy-five pounds and limitations of repetitive gripping and no crawling, climbing and walking at unprotected heights. The permanent restrictions and the impairment ratings are incongruous. If the [c]laimant's permanent impairment is to the extent described by Dr. Curtis then logically her permanent restrictions should be much greater than he assigned. Also, [c]laimant's every day activities have not been limited or changed as a result of her accident. Further, many of the objective tests did not show any impairment, especially to the upper extremities like the EMG Tinsel's [sic] testing and Phalens' testing. There was no evidence of range or [sic] motion deficits or sensory deficits in the upper extremities. For those reasons, the Court will not adopt Dr. Curtis [sic] impairment ratings.³

The ALJ went on to adopt Dr. Fevurly's opinions of 5 percent bilaterally to claimant's elbows.

The Board has carefully considered the physicians' opinions and the ALJ's rationale and concludes that the ALJ's Award should be affirmed in part and modified in part.

Like the ALJ, the Board is not persuaded that claimant sustained a neck or left knee injury in the April 2006 accident. Likewise, the Board finds that claimant has also failed to establish a permanent worsening of her right knee impairment. Both Dr. Fevurly and Dr. Schmidt have indicated that claimant's right knee complaints reflect only a temporary aggravation. And as for the left knee complaints, other than Dr. Curtis' evaluation in 2006 and the rather belated rating to that appendage during his deposition, there is little evidence that the left knee complaints bear any relationship to claimant's accident. Neither Dr. Fevurly nor Dr. Schmidt reference left knee complaints. Dr. Fevurly also opined that although claimant is complaining of neck pain, that alone is insufficient under the *Guides* to qualify for a permanency rating. Thus, this aspect of the ALJ's Award is affirmed and claimant is not entitled to any impairment for her neck, left or right knee complaints.

Turning now to claimant's bilateral elbow complaints, both Drs. Curtis and Fevurly have rated claimant and they clearly have divergent views as to her impairment. But after reviewing both physicians' deposition testimony, the Board finds it is no less persuaded by one physician over the other. Dr. Curtis was the treating physician and is to be accorded at least some deference for the time spent treating claimant whereas Dr. Fevurly examined claimant on a single occasion. This is not to suggest that a treating physician is to be accorded greater weight. To the contrary, under these facts and circumstances, the Board finds that neither physician is any more or less credible than the other and that an average of the two physicians' ratings is more indicative of the claimant's impairment and ongoing complaints. Accordingly, the Award is modified to reflect a 14.5 percent permanent impairment to the left elbow and a 10 percent permanent impairment to the right.

³ ALJ Award (Apr. 8, 2009) at 5-6.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated April 8, 2009, is affirmed in part and modified in part as follows:

The claimant is entitled to 6.27 weeks of temporary total disability compensation at the rate of \$265.35 per week in the amount of \$1,663.74 followed by 29.54 weeks of permanent partial disability compensation, at the rate of \$265.35 per week, in the amount of \$7,838.44 for a 14.50 percent loss of use of the left arm, making a total award of \$9,502.18.

The claimant is entitled to 6.27 weeks of temporary total disability compensation at the rate of \$265.35 per week in the amount of \$1,663.74 followed by 20.37 weeks of permanent partial disability compensation, at the rate of \$265.35 per week, in the amount of \$5,405.18 for a 10 percent loss of use of the right arm, making a total award of \$7,068.92.

All the medical bills are ordered to be paid as authorized medical.

IT IS SO ORDERED.

Dated this _____ day of August 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge